

CLIFF GALLAUGHER ET AL.

IBLA 92-531, 92-532

Decided October 7, 1997

Appeals from decisions of the Area Manager, Cottonwood Resource Area, Bureau of Land Management, approving wetland mitigation and fish enhancement activities on the surface of unpatented mining claims under the authority of the Surface Resources Act. EA ID-060-92-08, EA ID-060-92-05.

Affirmed.

1. Mining Claims: Surface Uses–Surface Resources Act: Management Authority

The Department of the Interior's right to manage surface resources on the surface of unpatented mining claims under section 4(b) of the Surface Resources Act, 30 U.S.C. § 612(b) (1994), includes the authority to establish, reclaim, and enhance wetlands on the surface of such claims.

2. Mining Claims: Surface Uses–Surface Resources Act: Management Authority

The Surface Resources Act authorizes the Department to manage and dispose of resources found on the surface of unpatented mining claims, provided that uses of the surface by the United States, its licensees, or its permittees do not endanger or materially interfere with prospecting, mining, or processing operations or uses reasonably incident thereto. Absent evidence that a specific surface management action endangers or materially interferes with actual, established prospecting, mining, or processing operations or reasonably related uses, BLM's approval of the specific surface management action will be approved despite allegations that the action will impede future, potential mining and related activities on the involved claims.

APPEARANCES: Merlyn W. Clark, Esq., Boise, Idaho, for Cliff Gallagher; Richard Mickelson and Irvin and Barbra Lange, pro sese; Robert S. Burr, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Boise, Idaho, for the Bureau of Land Management; Randall B. Reed, Esq., Boise, Idaho, for intervenor Idaho Gold Corporation.

## OPINION BY ADMINISTRATIVE JUDGE BURSKI

Cliff Gallagher has appealed from a determination of the Cottonwood Resource Area Manager, Bureau of Land Management (BLM or the Bureau), dated June 1, 1992, accepting a finding of no significant impact (FONSI) and authorizing implementation of the proposed alternative described in the Buffalo Gulch Mine Wetland Mitigation Plan and environmental assessment (EA) ID-060-92-08 (IBLA 92-531). Gallagher, individually, and Richard S. Mickelson and Irvin and Barbra Lange, collectively, have separately appealed from the Cottonwood Resource Area Manager's determination, dated June 4, 1992, confirming a FONSI and approving the American River Fish Habitat Enhancement Plan analyzed in EA ID-060-92-05 (IBLA 92-532). By Order dated September 15, 1992, the Board consolidated these two appeals for the purpose of consideration and review and granted intervenor status to Idaho Gold Corporation (Idaho Gold), the proponent of the Buffalo Gulch Mine Project Wetland Mitigation Plan.

Gallagher owns three unpatented placer and three unpatented lode mining claims in secs. 13 and 24, T. 29 N., R. 8 E., Boise Meridian (B.M.), Idaho County, Idaho, which include lands within, adjacent to, and near the American River. Mickelson and the Langes hold three unpatented placer mining claims, located in 1981, which embrace lands within secs. 2 and 3, T. 29 N., R. 8 E., B.M., along both sides of the American River.

In August 1990, the Cottonwood Resource Area Office approved Idaho Gold's plan of operations for the Buffalo Gulch Mine Project near Elk City, Idaho. In order to comply with section 404 of the Clean Water Act, 33 U.S.C. § 1334 (1994), Idaho Gold included in its plan of operations a wetland mitigation plan which proposed the creation of an on-site wetland during reclamation activities and the enlargement of an off-site wetland area on BLM administered lands along Lower Buffalo Gulch Creek. The U.S. Army Corps of Engineers, the agency charged with administering section 404 of the Clean Water Act, reviewed the mitigation plan and determined that compliance with the Clean Water Act and the Federal wetland policy of "no net loss" required additional wetland mitigation acreage as compensation for existing wetland functions and values lost or diminished by the mining project. Idaho Gold, therefore, supplemented its initial wetland mitigation plan by adding two additional off-site wetland mitigation areas on public lands administered by BLM: BLM logging road seep development sites and American River wetland mitigation sites. See EA ID-060-92-08 at 1-1 through 1-4.

The American River component of the wetland mitigation plan (the plan) affects a 1-mile corridor of previously placer-mined lands located in secs. 13 and 24, T. 29 N., R. 8 E., B.M. The plan divides the designated land into three mitigation areas: Area 1, north of the American River Bridge; Area 2, south of the bridge on the west side of the river; and Area 3, south of the bridge on the east side of the river. These main areas are further subdivided into 11 smaller individual mitigation

sites. Id. at 2-15. Wetland mitigation development activities for Area 1 (sites 1-7) include excavating existing placer tailing cobble and gravel to slightly below groundwater level, using soil from existing stockpiles in the area to fill the excavated areas with 6 inches of soil to create a new ground surface approximately 18 inches from groundwater, utilizing excavated placer tailing material to raise the elevation of the adjacent upper American River roadbed, and relocating the American River Road on a hillside east of the existing wetland area. Wetland mitigation actions for Area 2 (site 8) involve excavating the area to slightly below the elevation of existing small wetland areas and applying topsoil from existing stockpiles, contouring the site to a natural appearance, and revegetating the newly developed wetland. Wetland development for Area 3 (sites 9-11) focusses on excavating placer tailing piles and upland to slightly below the level of the river or existing small interior wetland areas, placing excess excavated tailing material in designated fill areas, filling the excavated areas with topsoil from existing stockpiles, creating a new ground surface within 18 inches of groundwater, and revegetating with wetland species. Id. at 2-23 and 2-24. <sup>1/</sup>

The EA for the supplemental wetland mitigation plan indicated that earlier placer mining activities had disturbed the American River sites, but found that no such operations had occurred since 1982. Id. at 3-2. While acknowledging that the sites lay within the boundaries of three unpatented mining claims, the EA observed that no active notices, mining plans, or dredging applications had been filed with BLM or the State of Idaho and that BLM considered the mineral potential for these areas to be low. Id. at 3-14, 3-17, 4-19. Due to the lack of current exploration or mining proposals for the sites, the EA concluded that implementation of the plan would result in no immediate conflicts or impacts to claimants of record for those sites. Prediction of probable impacts to future exploration or mining on the sites would be speculative and subjective, the EA continued, because BLM had no control over the public's initiation of such activities. Id. at 4-18.

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<sup>1/</sup> As proposed, wetland mitigation development along the American River creates 11.9 acres of new or enhanced wetland functions and values in secs. 13 and 24, T. 29 N., R. 8 E., B.M. See unnumbered page 2 of enclosure included with Jan. 30, 1992, Area Manager letter requesting public input on the wetland mitigation and fish habitat enhancement proposals. The EA ID-060-92-08 also outlines a modified proposed action for site 9, which would be required if BLM approved the proposed alternative for the American River Fish Habitat Enhancement Project. The modified action involves the same development activities as the proposed action but results in a small net reduction of new wetland acres for site 9 because the land within site 9 consumed by the channel segment relocation component of the fisheries habitat enhancement project exceeds the river channel acreage freed for reclamation. See EA ID-060-92-08 at 2-29 and 2-31, Fig. 2.2-1. Apparently, BLM approved the proposed alternatives for both the wetland mitigation plan and the fish habitat enhancement project without addressing this inconsistency. See n.2, infra.

Nevertheless, the EA recognized that the plan might adversely affect mineral claimants or recreational miners by reducing potential flexibility for mining exploration and development and increasing possible rehabilitation costs associated with compliance with the wetland protection and compensation provisions of section 404 of the Clean Water Act. The EA considered the likelihood of these adverse impacts to on-site claimants to be small, except for use of the new wetland areas as potential waste/overburden stockpile areas for any future adjacent or nearby off-site mineral development. The EA noted that, in any event, wetland areas currently existed within the mitigation site boundaries necessitating section 404 compliance if mining activities were proposed, regardless of implementation of the wetland mitigation plan, and that any mining activities involving disturbance of the American River channel or banks would require compliance with applicable state and Federal water quality, fishery protection, and wetland laws. Id.

In his June 1 determination concurring with the EA's FONSI and approving the wetland mitigation plan, the Cottonwood Area Manager implemented all components of the proposed action subject to the following condition derived from the mitigation measures recommended in the EA:

It is known that some mining claimants are opposed to activities which pertain to aquatic, riparian, or wetland restoration activities. Mineral claimants that may be affected by the restoration efforts will be contacted prior to commencement of the project to determine future mining plans. Potential conflicts between rehabilitation efforts and mineral exploration and development will be dealt with through negotiations. If conflicts cannot be resolved through negotiations then it is recommended that the BLM initiate validity examination(s) of the claim(s). The validity exam process should be considered only as a last resort and will be used as a means to validate or refute a claimant's discovery.

(Decision at 1; see also EA ID-060-92-08 at 5-1.)

The American River Fish Habitat Enhancement Project embodies BLM's strategy to achieve land use plan objectives for fisheries in the American River. The project involves stream enhancement efforts for approximately 5 miles of the river in secs. 2, 3, 12, 13, 24, and 25, T. 29 N., R. 8 E., B.M., Idaho County, Idaho, near Elk City, Idaho, and focusses on improving spawning and rearing habitat for spring chinook salmon, steelhead trout, and resident fish. The planned actions include: (1) installing rock/log check dams; (2) placing woody debris in the stream channel; (3) positioning approximately 1,000 habitat rocks in the stream channel; (4) adding approximately 10 rock wing deflectors; (5) stabilizing the streambanks; (6) enhancing riparian areas and floodplains; (7) constructing and relocating approximately 700 feet of the river channel to develop a natural meander channel and filling in the existing channel with excavated material

from the new channel; and (8) building a rearing pond for anadromous fish. (EA ID-060-92-05 at unnumbered pages 1-3.) 2/

In addressing the environment affected by the project, the EA observed that most of the American River valley bottom had been placer mined, leaving only isolated pockets of ground remaining unworked. According to the EA, the land surface consisted primarily of unreclaimed dredge piles and soil stockpiles with scattered areas of wetland and impounded water, while the river itself flowed through the rather narrow and straight channel generated by earlier mining activity. The EA indicated that the project area contained several unoccupied and inactive unpatented mining claims administered by BLM but that no active notices or plans of mining activities had been submitted to BLM nor had any dredging permits been filed with the State of Idaho. The EA also briefly outlined placer mining operations occurring in the mid-1980's, as well as the most recent placer mining activity which terminated in 1991, and concluded that the mineral potential for the project area was low. Id. at unnumbered pages 8-9.

Because none of the claimants of record had proposed current exploration or mining activities, the EA found no immediate conflicts or impacts to the claimants as a result of the proposed fish habitat enhancement project, adding that predictions of probable effects to future exploration or mining from the project would be purely speculative and subjective given BLM's lack of control over the initiation of those activities. The EA acknowledged, however, that future consequences to mineral claimants or recreational miners could entail increased reclamation costs, decreased land available for mining or dredging, reduced flexibility in developing exploration and mine plans, and diminished access to mineral claims. Although the existing mining claims contained interspersed wetland, riparian areas, and aquatic habitat, the EA stated that restoration of additional floodplains, riparian habitat, and wetlands might require mineral claimants to restore or replicate the various environments at a ratio greater than the amount disturbed by mining. Id. at unnumbered pages 11-12.

By Decision dated June 4, 1992, the Area Manager adopted the EA's FONSI and approved implementation of all components of the proposed fish habitat enhancement project. The determination incorporated the recommended mitigation measures delineated in the EA, including a condition virtually identical to the wetland mitigation plan condition cited above. See Decision at 1; EA ID-060-92-05 at unnumbered page 14.

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2/ Alternative 2 of the proposed project, denominated the instream fish habitat enhancement alternative, incorporates the intensive fish habitat, riparian, and wetland restoration actions identified in the proposed action but defers construction of the meander channel and rearing pond. EA ID-060-92-05 at unnumbered page 4. Implementation of this alternative would complement Idaho Gold's proposed wetland mitigation plan, rather than slightly conflict with that plan. See EA ID-060-92-08 at 2-29 and n.1, supra.

Gallaughier has appealed both BLM's approval of the wetland mitigation plan and certain aspects of BLM's determination to implement the fish habitat enhancement project. In his statement of reasons (SOR) challenging the wetland mitigation plan, <sup>3/</sup> Gallaughier essentially alleges that the activities described for all three mitigation areas defined in the plan would endanger or materially interfere with prospecting, mining, or processing operations and uses reasonably incident thereto on his three placer and three lode mining claims in violation of section 4(b) of the Surface Resources Act (the Act), 30 U.S.C. § 612(b) (1994). He disputes the EA's statement that the affected mining claims are unoccupied and inactive, asserting that he has occupied those claims for over 25 years and has actively performed the required annual assessment work for the claims. While acknowledging that, at the time the EA was prepared and the plan approved, no active notices or mining plans had been filed for the area, he states that he has now submitted a notice of proposed mining activities covering all six of his claims, a copy of which he appends to his SOR. Gallaughier also disagrees with BLM's assessment of the mineral potential of the mitigation area, suggesting that BLM based its opinion on unreliable literature and neglected to perform any independent tests to ascertain the claims' values. He states that, based on his own experience, old mining methods left the majority of minerals in place where they currently remain.

Gallaughier maintains that, notwithstanding BLM's contrary conclusions, the implementation of the mitigation project would result in immediate conflict with or adverse impact to his claims, citing as an example the inclusion in the plan of perimeter fencing to protect mitigation sites from additional surface disturbances during the establishment of wetland vegetation as impeding his use of the claims. He further insists that the plan unfairly shifts the burden of compliance with wetland protection mandates from Idaho Gold to himself. In short, Gallaughier objects to any use of the surface of his mining claims for the wetland mitigation plan because such activities would endanger or materially interfere with operations on the claims, would significantly and adversely impact the claims, and would constitute a taking of those claims. <sup>4/</sup>

Gallaughier's SOR supporting his appeal of BLM's approval of the American River Fish Habitat Enhancement Project asserts that the riparian

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<sup>3/</sup> The Board did not consolidate the two appeals until after Gallaughier had submitted separate SOR's for each of his appeals.

<sup>4/</sup> Although Gallaughier also contends that he was not given any opportunity to provide input into the EA, the record contains several letters from BLM to Gallaughier and others notifying them of the project and requesting comments, as well as responses from Gallaughier objecting to both the wetland mitigation plan and the fish habitat enhancement project. Therefore, we find BLM adequately sought and considered public comments in the formulation and finalization of the challenged Decisions.

and floodplain enhancement and the construction and relocation of approximately 700 feet of the river channel to develop a natural meander channel on his mining claims described in paragraphs 6 and 7 of the proposed action (Alternative 1) would endanger or materially interfere with prospecting, mining, and processing operations or uses reasonably incident thereto on his claims. <sup>5/</sup> Gallagher reiterates his challenge to BLM's assertion that the mineral potential for the project is low, noting that he has recently submitted a notice of proposed mining operations for the claims, and insists that the project would adversely affect his mining activities in a direct way.

Specifically, Gallagher avers that channel relocation and riparian and floodplain improvement would not only immediately interfere with and prohibit his endeavors, but would also permanently preclude any exploration or mining in the affected portions of the claims, thus materially impeding or totally thwarting future exploration and mining within or adjacent to the lands included in the riparian and floodplain development and channel relocation. He further contends that the increased reclamation costs, reduced acreage available for mining, decreased flexibility in developing exploration and mine plans, and diminished access to his mining claims resulting from implementation of the challenged aspects of the project would prevent him from performing his proposed mining operations and future mining exploration and operations. Because the fish habitat enhancement project would produce significant adverse impacts to his mining claims and his development plans for those claims and would endanger or materially interfere with mining activities, Gallagher argues that implementation of the project violates section 4(b) of the Act, 30 U.S.C. § 612(b) (1994).

Mickelson and the Langes have also appealed from BLM's determination approving the fish habitat enhancement project, objecting to all components of the proposed alternative. They aver that they have done spot exploration mining and assessment work on the affected claims every year since 1981 in order to pinpoint the most potentially productive areas to mine when they retire. They assert that they need the income from mining to supplement their retirement and that, while they recognize that gold mining is risky, implementation of the fish habitat enhancement project would magnify the risk and significantly limit the area available for mining.

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<sup>5/</sup> Although a July 13, 1992, letter submitted by Gallagher to BLM indicates that he is appealing from that portion of the project proposing to relocate the existing streambed and create a rearing pond, and related work which would deny or restrict access to his mining claims, Gallagher's SOR limits the scope of his appeal to riparian and floodplain enhancement activities and construction and relocation of the existing river channel and does not address the creation of a rearing pond. Accordingly, we confine the breadth of his appeal to the issues discussed in his SOR.

with some claims losing up to 70 percent of the land currently available for exploration and development. They disagree with BLM's FONSI, alleging that the project would be detrimental to their mining claims since the outlined work would render it impossible for them to do any mining in the future. They, therefore, contend that their claims are adversely affected by the fish habitat enhancement project and that the project materially interferes with their present and future mining claim operations. Finally, they object to BLM's adoption of the recommendation which directs that validity examinations of affected mining claims will be conducted if negotiations fail to resolve conflicts between asserted mining claim uses and the fish habitat enhancement activities, suggesting that this approach constitutes a threat to their mining claim rights.

In its Answer, BLM denies that implementation of either the wetland mitigation plan or the fish habitat enhancement project violates section 4(b) of the Act, 30 U.S.C. § 612(b) (1994). The Bureau first avers that the establishment, reclamation, and enhancement of wetlands on previously mined areas to benefit fish and wildlife, as well as the improvement of fish habitat, fall within the parameters of BLM's authority to manage "other surface resources" on unpatented mining claims granted by the Act. While acknowledging that the Act restricts BLM's surface management power to those activities which do not endanger or materially interfere with prospecting, mining, or processing operations or uses reasonably incident thereto, BLM insists that neither of the approved actions imperils or substantially hinders mining and related endeavors on the affected claims.

Recognizing that Federal management of surface resources must yield to legitimate mining as the dominant, primary use when conflicts arise with valid mining claims, BLM summarizes its attempts to meet with all claimants of record, including Gallagher, Mickelson, and the Langes, to coordinate the proposals with claimants' mining activities. The Bureau explains that the absence of current mining on the claims and the lack of any specific mining or exploration plans or notices proposing such activities led it to conclude that neither the wetland mitigation plan nor the fish habitat enhancement project would endanger or materially interfere with mining and related uses on these claims. The Bureau asserts that, upon receipt of Gallagher's notice filed under 43 C.F.R. § 3809.1-3, its staff met with Gallagher to discuss his exploration plans, including the precise location of the planned work, and determined that neither of the proposed projects would interfere with Gallagher's contemplated exploration operations.

The Bureau argues that unsupported assertions that the wetland mitigation and fish habitat enhancement proposals will endanger or materially interfere with unidentified future mining activities does not suffice to invalidate its management decisions. While again conceding that surface resource management must yield to any ongoing or proposed legitimate mining use of the land, including the right to mine in developed wetlands or fish habitat, BLM insists that allowing a mere allegation that mining claims will be adversely affected, absent active operations or pending mining



notices or plans, to defeat BLM's right to manage the surface resources of unpatented claims would effectively render that right nugatory in any situation where a claimant might choose to oppose such management based on future, possible mining-related activity which might never, in actuality, be implemented. Since no evidence exists that its approved projects will endanger or materially interfere with Gallagher's current or proposed operations, BLM insists that unsubstantiated claims of adverse effect do not invalidate its approval decisions, especially given its commitment to coordinate surface management actions with future proposed mining by according legitimate mining uses the priority to which they are entitled.

In reply, Gallagher denies that section 4(b) of the Act, 30 U.S.C. § 612(b) (1994), empowers BLM to establish wetlands on the surface of his mining claims. While admitting that BLM has the authority to manage fish and fish habitat, Gallagher opposes BLM's attempt to expand that authority, arguing that BLM's power to manage and dispose of the resources found on the surface of mining claims does not include the creation of wetlands where none previously existed solely for the purpose of mitigating the loss of wetlands on mining claims owned by other entities. The purpose of the Act, Gallagher submits, is to protect mining property from abuses and promote proper utilization of mining claims without misuse of surface resources, and those goals, he avers, would not be furthered by constructing new wetlands on his claims as compensation for the loss of such resources on unrelated claims. Because the Act did not diminish the primary, dominant right of mining locators to use the surface resources of their claims for mining activities, Gallagher contends that burdening his claims with newly developed wetlands subject to the wetland protection measures mandated by Federal and state law would deprive him of his protected property interest in his claims by limiting his mining options to those which would not reduce or impair the wetland values created on the claims. Gallagher, therefore, asserts that the wetland mitigation plan far exceeds any authority granted to BLM to manage surface resources on the claims.

Gallagher also disputes BLM's contention that the lack of extensive current mining operations on all of the claims in question justifies establishing wetlands, which would encumber and hinder future prospecting and mining, on portions of the claims not presently subject to mining. Gallagher maintains that the Act restricts BLM's management authority not only to activities which do not endanger or materially interfere with current, ongoing mining and related uses but also to actions which will not impede or interfere with future prospecting and mining operations on unpatented claims. Because the wetland mitigation plan fails to advance the Act's goals by protecting Gallagher's claims or preventing an abuse of the surface of those claims and materially interferes with future, if not present, mining activities on the claims, Gallagher concludes that BLM's approval of the plan violates section 4(b) of the Act, 30 U.S.C. § 612(b) (1994), and must be reversed.

At the outset, we note that prior to July 23, 1955, while the owner of an unpatented mining claim had the right to use surface resources found

on the claim for mining related purposes, neither the claimant nor the United States had the power to manage or dispose of the surface resources not needed for mining uses. See Bruce W. Crawford, 86 IBLA 350, 364-65 (1985), and authorities cited; see also Robert E. Shoemaker, 110 IBLA 39, 53 (1989). Section 4(b) of the Act, 30 U.S.C. § 612(b) (1994), remedied this omission by vesting that authority in the United States. Bruce W. Crawford, *supra*, at 365. That section provides:

Rights under any mining claim hereafter located under the mining laws of the United States [6/] shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: Provided, however, That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto \* \* \*.

These appeals focus on whether the resources affected by BLM's determinations fall within the scope of "other surface resources" the Act empowers BLM to manage and, if so, whether the approved proposals endanger or materially interfere with mining and related operations on the claims. We find that BLM has the authority to manage both wetlands and fish habitat and that, based on the record before us, neither the wetland mitigation plan nor the fish habitat enhancement project imperils or substantially impedes mining activities on the claims.

[1] While the phrase "other surface resources" admittedly is ambiguous, see, e.g., United States v. Curtis-Nevada Mines, Inc., 611 F.2d 1277, 1280 (9th Cir. 1980); Robert E. Shoemaker, *supra*, at 48, that phrase undoubtedly encompasses fish and fish habitat. Robert E. Shoemaker, *supra*,

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6/ Although the case file before us does not indicate when Gallagher's claims were located, Gallagher has not alleged that his claims were located prior to the July 23, 1955, enactment of the Act. Since Gallagher's mining claims were located subject to BLM's right to manage the surface resources of the claims, the mere exercise of surface management authority by BLM, as authorized by the Act, does not constitute an unlawful taking of Gallagher's property, his assertions to the contrary notwithstanding.

at 48-50. Gallagher does not seriously dispute the inclusion of naturally-occurring wetlands within the ambit of the phrase, and, although wetland areas are not specifically mentioned in the legislative history, we find the statutory phrase broad enough to encompass such areas, especially since wetlands contain many of the resources so delineated. See H.R. Rep. No. 730, 84th Cong., 1st Sess. 3, reprinted in 1955 U.S.C.C.A.N. 2474, 2475. See also Robert E. Shoemaker, supra, at 48-49.

Gallagher argues instead that the wetland mitigation plan, rather than managing existing surface resources, impermissibly creates new resources where none previously occurred. The EA for the wetland mitigation plan, however, indicates that the American River mitigation sites currently contain small wetland areas as well as riparian and wetland zones destroyed by earlier mining activity. See, e.g., EA ID-060-92-08 at 3-2, 3-4, 3-11. Thus, the approved plan does not import totally alien resources into the area, but simply develops, improves, and expands upon resources which, while not now extant on the sites, once flourished there and augment the resources presently on the sites. In any event, BLM's right to manage the surface resources on unpatented mining claims is not confined to simply preserving those resources as they exist, but also embraces enhancing those resources. See Robert E. Shoemaker, supra, at 50. Accordingly, we hold that wetland improvement activities and fish habitat enhancement techniques fall within BLM's authority to manage "other surface resources" on unpatented mining claims.

[2] The Act, however, further limits authorized surface uses to those which do not "endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto." 30 U.S.C. § 612(b) (1994). This provision reflects the balance struck by Congress to resolve conflicts between Federal management of surface resources found on a mining claim and the claimant's legitimate use of the surface and surface resources by confirming that Federal surface management activities must yield to mining as the dominant and primary use. Robert E. Shoemaker, supra, at 53. Thus, our inquiry shifts to whether the described wetland mitigation and fish habitat enhancement activities imperil or substantially hinder, impede, or clash with claimants' mining operations. See id. at 54.

Gallagher, Mickelson, and the Langes have neither alleged that they were actively conducting mining or related operations, other than the statutorily required annual assessment work, at the time the challenged determinations were issued, nor identified any specific instances where the approved projects would affect ongoing mining uses, and we find that the record supports BLM's conclusion that the wetland mitigation plan and fish habitat enhancement project will not endanger or materially interfere with active mining operations. Although Gallagher did file a notice of proposed mining activities after issuance of the challenged approvals, BLM's examination of the areas involved in the mining actions described in the notice revealed no conflict between those undertakings and the wetland and fish habitat projects, a finding which Gallagher has not challenged on

appeal and which we sustain. Claimants argue, however, that the possibility that the approved projects might imperil or materially impede potential future mining uses of the claims suffices to invalidate BLM's approval actions as violative of the Act. We disagree.

While the language of the Act is silent on this issue, the legislative history reciting the purposes of the Act clarifies that the Act was designed to "limit surface use to those activities which do not endanger or materially interfere with established mining operations or related uses." H.R. Rep. No. 730, 84th Cong., 1st Sess. 3, reprinted in 1955 U.S.C.C.A.N. 2474, 2475 (emphasis added). As the court in United States v. Curtis-Nevada Mines, Inc., supra, explained:

One of the clear purposes of the 1955 legislation was to prevent the withdrawal of surface resources from other public use merely by locating a mining claim. The inertia of the situation was previously with the mining claimant who retained exclusive possession of the surface of the claim until the location was invalidated by affirmative action. As to claims located after the 1955 legislation, however, the inertia works the other way. Essentially, the surface resources remain in the public domain for use as before with the exception that the mining claimant is entitled to use the surface resources for prospecting and mining purposes and that the other uses by the general public cannot materially interfere with the prospecting and mining operation. Thus, the vast acreage upon which mining claims have been located since 1955 \* \* \* remain open for public use except for restrictions imposed where actual mining or prospecting operations are taking place.

611 F.2d at 1285 (footnote omitted; emphasis added). To accept claimants' suggestion that the mere possibility of future mining precludes BLM management of the surface resources on the claim would negate the authority granted by the Act and lead to the return of the situation the Act was devised to remedy. Accordingly, we find that only surface uses which endanger or materially interfere with actual, established prospecting, mining, processing, or related uses are restricted by the Act.

The Bureau has acknowledged that its surface management authority must yield to legitimate mining operations conducted by claimants and has expressed its continuing commitment to coordinate its actions with future mining activities undertaken by claimants. Should BLM fail to accord future mining proposals the dominant priority claimants consider warranted, they have at least two remedies: they can appeal such actions to this Board, and if dissatisfied, bring suit to enjoin the activity, or they can apply for a patent which, when granted, would convey fee title to the property. See United States v. Curtis-Nevada Mines, Inc., supra, at 1286. Moreover, BLM's willingness to consider the initiation of mineral contests where conflicts between its surface management programs and the desires of mineral claimants cannot be amicably resolved, far from constituting an improper threat, represents the utilization of a legitimate

mechanism for the resolution of such conflicts. Mining claims are, after all, an assertion by the locator that he or she has made a discovery of a valuable mineral deposit which vests in him or her rights to the mineral estate as against the United States. If the Department has a legitimate reason to believe that the requirements of the mining law have not been fulfilled in any individual case, commencement of a mining contest to afford claimants an opportunity to establish that a discovery has, in fact, been made fully accords with the Department's responsibility to exercise its delegated authority "to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved." Cameron v. United States, 252 U.S. 450, 459-60 (1920). Appellants have no legitimate cause for complaint on this point.

To the extent not specifically addressed herein, the issues raised in these appeals have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM's determinations appealed from are affirmed.

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James L. Burski  
Administrative Judge

I concur.

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Will A. Irwin  
Administrative Judge

